Parkunan a/l Achulingam v Kalaiyarasy a/p Periasamy

HIGH COURT (KUALA LUMPUR) — DIVORCE PETITION NO S8–33–55 OF 2003
FAIZA TAMBY CHIK J
9 FEBRUARY 2004

Family Law — Divorce — Maintenance — Whether wife and children entitled to maintenance claimed, arrears and husband's EPF contribution — Assessment of amount payable — Factors to consider — Law Reform (Marriage and Divorce) Act 1976 ss 77, 78, 86, 92, 93, 98

Family Law — Matrimonial property — EPF contributions — Whether a matrimonial asset

Evidence — Adverse inference — Failure to disclose material evidence — Failure to disclose financial capacity — Whether presumption under s 114(g) Evidence Act be invoked against husband

The petitioner husband filed this divorce proceeding against the respondent wife. Subsequently, the wife filed a cross-petition against the husband, claiming maintenance for the children and herself, arrears of maintenance, increased maintenance, the children's education fund including tertiary education and the husband's Employees Provident Fund ('EPF') contributions. During the course of the proceeding, both parties had reached a settlement as to the division of matrimonial assets.

The remaining issues before this court were: (a) whether the wife and children to the matrimonial proceedings were entitled for maintenance and if the answer was in the affirmative, the factors to be considered in determining the amount of maintenance; (b) whether the wife and the children to the matrimonial proceeding were entitled for the arrears of maintenance; and (c) whether the wife was entitled for the husband's EPF contributions.

Held, allowing the wife's cross-petition with costs:

(1) The husband had the primary obligation to maintain the children. The mother only has a secondary obligation where the court was satisfied that having regard to her means it was reasonable for her to do so. The term 'maintenance' used in ss 77 and 92 of the Law Reform (Marriage and Divorce) Act 1976 ('the LRA') should be construed widely as it signifies any form of material provision that would enable the wife and children to be placed in a position to enjoy the same standard of living as they did during the existence of the marriage (see paras 4 and 5).

(2) In determining the amount of maintenance to be paid, the assessment was based primarily on the means and the needs of the parties by virtue of s 78 of the LRA taking into account the standard of living of the parties. This includes the capacity of the husband, his ability to pay and the realities of the husband or parties financial position, the potential earning of the applicant as well as the degree of responsibility which the court apportions to each party for the breakdown of the marriage (see paras 3, 7 and 24).

(3) Section 86 of the LRA provides for the recovery of arrears of maintenance for the wife while s 98 of the LRA provides for the recovery of arrears of maintenance for the children (see para 20); *Diana Clarice Chan Chiing Hwa v Tiong Chiong Hoo* [2002] 2 MLJ 97 followed.

(4) An adverse inference under s 114(g) of the Evidence Act 1950 was drawn against the husband as a result of his failure to provide full and frank disclosure as to his financial capacity to meet the wife's and children's claims for maintenance (see para 18); *Leow Kooi Wah v Phillip Ng Kok Seng* [1997] 3 MLJ 133 followed.

(5) Contributions to the EPF are considered as a matrimonial asset, as it is acquired during the existence of a marriage and therefore is subject to division between the parties (see para 21); *Lim Kuen Kuen v Hiew Kim Fook & Anor* [1994] 2 MLJ 693 referred.

[**Bahasa Malaysia summary**

Pempetisyen suami telah memfailkan petisyen perceraian ini terhadap responden isteri. Seterusnya, pihak isteri telah memfailkan petisyen-balas bagi pihaknya dan anak-anak terhadap si suami untuk nafkah, nafkah tertunggak, nafkah tambahan, pembiayaan pendidikan termasuk pendidikan tinggi anak-anak dan caruman Kumpulan Wang Simpanan Pekerja pempetisyen suami. Semasa prosiding petisyen ini dibicarakan, kedua-dua pihak telah mencapai persetujuan terhadap pembahagian harta perkahwinan.

Baki isu-isu yang telah perlu diputuskan oleh mahkamah ini adalah: (a) sama ada isteri dan anak-anak kepada prosiding perkahwinan berhak kepada nafkah dan sekiranya jawapan kepada soalan ini adalah positif apakah faktor-faktor yang perlu diambil kira dalam menentukan jumlah nafkah tersebut; (b) sama ada isteri dan anak-anak kepada prosiding perkahwinan berhak kepada nafkah tertunggak; dan (c) sama ada isteri berhak kepada simpanan Kumpulan Wang Pekerja pempetisyen suami.

Diputuskan, membenarkan petisyen-balas isteri dengan kos:

(1) Suami mempunyai tanggungjawab yang utama untuk menyara anak-anak. Ibu hanya mempunyai tanggungjawab sampingan untuk menyara anak-anak sekiranya mahkamah berpuashati dengan mengambilkira terhadap kemampuannya bahawa ia adalah munasabah untuk dilakukan. Perkataan 'nafkah' yang digunapakai di dalam ss 77 dan 92 Akta Memperbaharui Undang-Undang (Perkahwinan dan Perceraian) 1976 ('Akta') haruslah ditafsirkan secara terbuka di mana ia akan membolehkan isteri dan anak-anak diletakkan di dalam keadaan untuk menikmati taraf hidup yang sama yang dinikmati semasa kewujudan perkahwinan tersebut (lihat perenggan 4 dan 5).

(2) Dalam menentukan jumlah nafkah yang harus dibayar, taksiran nafkah tersebut adalah berdasarkan terhadap kemampuan dan keperluan pihak-pihak oleh sebab s 78 Akta mengambil kira taraf hidup pihak-pihak. Ini juga termasuk kapasiti suami, kemampuannya untuk membayar dan kedudukan sebenar suami atau kedudukan kewangan pihak-pihak,

keupayaan perolehan pendapatan pemohon termasuk juga tahap sumbangan pihak-pihak kepada perpecahan rumahtangga (lihat perenggan 3, 7 dan 24).

(3) Seksyen 86 Akta tersebut memperuntukkan isteri berhak mendapat kembali nafkah tertunggak manakala s 98 Akta yang sama pula memperuntukkan hak anak-anak untuk mendapat kembali nafkah tertunggak (lihat perenggan 20); *Diana Clarice Chan Chiing Hwa v Tiong Chiong Hoo* [2002] 2 MLJ 97 diikut.

(4) Inferens bertentangan di bawah Seksyen 114(g) Akta Keterangan 1950 dibuat terhadap si-suami kerana gagal memberikan pendedahan penuh dan jujur terhadap kapasiti kewangannya untuk memenuhi tuntutan nafkah oleh responden isteri dan anak-anak (lihat perenggan 18); *Leow Kooi Wah v Phillip Ng Kok Seng* [1997] 3 MLJ 133 diikut.

(5) Kumpulan Wang Simpanan Pekerja adalah harta perkahwinan, memandangkan ia adalah harta yang diperolehi dalam tempoh kewujudan perkahwinan, maka ia adalah tertakluk kepada pembahagian antara pihak-pihak (lihat perenggan 21); *Lim Kuen Kuen v Hiew Kim Fook & Anor* [1994] 2 MLJ 693 dirujuk.]

Notes

For cases on maintenance, see 7(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 3062–3073.

For cases on matrimonial property, see 7(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 3308.

For maintenance of spouse and children, see 8 *Halsbury's Laws of Malaysia*, paras [140.376]–[140.386].

Cases referred to

Borthwick, Re (Deceased), Borthwick v Beauvais [1949] Ch 395 (refd)
Ching Seng Woah v Lim Shook Lin [1997] 1 MLJ 109 (refd)
Diana Clarice Chan Chiing Hwa v Tiong Chiong Hoo [2002] 2 MLJ 97 (folld)
Gisela Gertrud Abe v Tan Wee Kiat [1986] 2 MLJ 297 (distd)
J v J [1955] P214 (refd)
Leow Kooi Wah v Phillip Ng Kok Seng [1997] 3 MLJ 133 (folld)
Lim Kuen Kuen v Hiew Kim Fook & Anor [1994] 2 MLJ 693 (refd)
Livesey v Jenkins [1985] FLR 812 (refd)
Lumsden v Lumsden [1963] 5 FLR 388 (refd)
Ng Lean Huat v Lim Joo Khim [1992] 3 CLJ 647 (distd)
Ong Chin Ngoh v Lam Chin Kian (refd)
Sivajothi a/p K Suppiah v Kunathasan a/l Chelliah [2000] 6 MLJ 48 (refd)

Legislation referred to

Evidence Act 1950 s 114(g)
Law Reform (Marriage & Divorce) Act 1976 ss 77, 78, 86, 92, 93, 98
Matrimonial Causes Rules 1977 [UK] rr 73, 74, 77

M Manoharan (M Manoharan & Co) for the petitioner husband.
YN Foo (Cynthia Bernard with her) (YN Foo & Partners) for the respondent wife.

Faiza Tamby Chik J:

[1] Parties have reached settlement and terms of settlement by consent are as in encl 29. The remaining issues to be decided in the petition are:

(1) the issue of maintenance;

(2) a claim of share from the petitioner's EPF contributions;

(3) the educational expenses of the children of the marriage.

[2] The respondent wife in her cross petition has prayed, *inter alia*, for the following prayers which remain for the determination of this court, namely:

(a) that the petitioner husband shall pay the respondent wife the sum of RM2,000 a month as maintenance for the respondent wife, which maintenance shall be payable in advance on or before the fifth day of each month;

(b) that the petitioner husband shall pay the respondent wife arrears of maintenance for (1) aforesaid from May 2001;

(c) that the petitioner husband shall pay the respondent wife the sum of RM3,000 a month as maintenance for the said children of the marriage, which maintenance shall be payable in advance on or before the fifth day of each month until the said children shall have attained the age of 18 years;

(d) that the sums payable for maintenance under prayers (1) and (3) shall be increased at the end of every 12-month period, the first of such increase to commence on the 13th month from the date of the order, such increase to be an amount equal to 5% of the maintenance payable for the 12 months immediately preceding the increase;

(e) that the petitioner husband shall pay for all the educational expenses for the said children of the marriage up to and including tertiary and/or university education, notwithstanding that the said children shall have attained the age of 18 years;

(f) that the respondent wife shall be entitled to one half share of the monies standing in the petitioner's provident fund.

[3] In determining the amount of maintenance to be paid, the assessment is based primarily on the means and the needs of the parties. The needs of the party seeking maintenance is the crucial factor for providing the maintenance. In deciding the quantum of maintenance, the capacity of the husband, his ability to pay and the realities of the husband or parties financial position should be taken into account. One other factor, the potential earning of the applicant should also be considered. The power to award maintenance to the wife is clearly provided by s 77 of the Law Reform (Marriage and Divorce)

Act 1976 ('the LRA'). Section 78 of the LRA provides that in assessing the amount of maintenance to be paid by a man to his wife or former wife, 'the court shall base it's assessment primarily on the means and needs of the parties, regardless of the proportion such maintenance bears to the income of the husband, but shall have regard to the degree of responsibility which the court apportions to each party for the breakdown of the marriage.' The assessment of the maintenance payable with respect to the children is provided for by Section 92 of the LRA which states that 'it shall be the duty of a parent to maintain his children, whether they are in his custody or in the custody of any other person, either by providing them with such accommodation, clothing, food and education as may be reasonable having regard to this means and station in life or by paying the costs thereof.' Section 93 of the LRA further provides that:

> (1) The Court may at any time order a man to pay maintenance for the benefit of his child —
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> (a) if he has refused or neglected reasonably to provide for the child;
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> (b) if he has deserted his wife and the child is in her charge;
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> (c) during the pendency of any matrimonial proceedings; or
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> (d) when making or subsequent to the making of an order placing the child in the custody of any other person.
>
> (2) The Court shall have the corresponding power to order a woman to pay or contribute towards the maintenance of her child where it is satisfied that having regard to her means it is reasonable so to order.

[4] Therefore it is clear that the husband has the primary obligation to maintain the children. The mother only has a secondary obligation where the court "is satisfied that having regard to her means it is reasonable to do so."

[5] The term 'maintenance' used in ss 77 and 92 of the LRA aforesaid, should be construed widely as it signifies any form of material provision that will enable the wife and children to be placed in a position to enjoy the same standard of living as they did during the existence of the marriage. In the case of *Re Borthwick (Deceased), Borthwick v Beauvais* [1949] Ch 395 at p 401, Harman J held:

> It is said that maintenance is the only thing you can look at. What does that mean? Itdoes not mean that you can only give the dependent just enough to put a little jam on his bread and butter. It has been already held that what is reasonable for one may not be reasonable for another. It must depend on the circumstances of the case. It certainly depends to some extent on the circumstances of the widow, but I think it may also depend on the circumstances of the testator, that is to say, whether he died a rich man or no, because a rich man may be supposed to have made better provision for his wife's maintenance than a poor one. Maintenance does not only mean the food she puts in her mouth it means the clothes on her back, the house in which she live, and the money which she has in her pocket, all of which vary according to the means of the man who leaves a wife behind him. I think that must be so. Maintenance cannot mean only a mere subsistence.

[6] In the Supreme Court of Victoria's case of *Lumsden v Lumsden* [1963] 5 FLR 388 at p 394, Herring CJ, Dean and Gowans JJ held:

In the second place in awarding maintenance the court endeavours, subject to the husband's financial position, to place the wife in a position to enjoy the same standard of living as she did during the marriage.

[7] I am of the opinion that in considering what amount of maintenance the petitioner husband should pay to the respondent wife as maintenance for herself and the children, we must consider the means and needs of the parties, taking into account the standard of living of the parties. In the case of *Ching Seng Woah v Lim Shook Lin* [1997] 1 MLJ 109, Mahadev Shankar JCA at p 120 had stated that:

> The parental duties in this context are spelt out by s 92 and it extends to accommodation, clothing, food and education as may be reasonable having regard to his or her means and station in life or by paying the cost thereof.

[8] In the case of *Sivajothi a/p K Suppiah v Kunathasan a/l Chelliah* [2000] 6 MLJ 48, I held as follows (at p 69):

> Maintenance signify any form of material provision that will enable an adult to live a normal life and a child to be brought up properly. Thus maintenance cannot mean only mere subsistence, ie the food she puts in her mouth but also means the clothes on her back, the house in which she lives and the money which she has to have in her pocket, all of which vary according to the means of the man who leaves a wife behind. Moreover, it is settled law that it is the duty of the father to maintain the standard of living the children had enjoyed in the past, ie during the existence of the marriage.

[9] It is observed that prior to the breakdown of the marriage, while parties were still living together as a family, the petitioner husband had provided the respondent wife with an average sum of some RM3,000 a month as household expenses, in addition to paying for other expenses including transport, assessment and quit rent on the home himself. The sum of RM3,000 was sufficient at the time as this amount was used to pay for the day to day expenses only while the larger bills were taken care of by the petitioner husband. Furthermore, the children were much younger then and their needs much less. In addition to receiving the maintenance of RM3,000 a month from the petitioner husband, the respondent wife also received an income of RM1,500 as director's remuneration from the company, Prisma Dagang Sdn Bhd where she was then a director and shareholder. The respondent wife therefore had a total sum of RM4,500 provided to her to run the household during the course of the marriage (see para 6.7(iv) of the respondent's answer and cross petition). However, sometime in September 2000, the petitioner husband forced the respondent wife under duress to resign as a director of Prisma Dagang Sdn Bhd thus depriving the respondent wife her monthly income of RM1,500 which she received as director's fees (see para 6.7(iv) of the respondent's answer and cross petition). Subsequently when the petitioner husband moved out of the matrimonial home, sometime in May 2001, the petitioner husband had unilaterally reduced the maintenance sum from RM3,000 to RM1,500 per month, a sum which was grossly inadequate for the maintenance of the respondent wife and three school going children (see para 6.8 of the respondent's answer and cross petition). The facts show that the petitioner husband stopped paying any maintenance altogether

from December 2001. For 13 months (ie one year one month), the respondent wife and the children received no maintenance. He only recommenced paying maintenance again in January 2003 just before the hearing of this matter and even then had again unilaterally further reduced the maintenance to RM1,000 a month as maintenance for the respondent wife and the three children of the marriage (see para 21.3 of the respondent's answer and cross petition).

[10] To determine the needs of the respondent wife and children, the court ought to take into account the standard of living that the respondent wife and children had been accustomed to during the existence of the marriage. During the course of the marriage, the respondent wife had at her disposal a total of RM4,500 a month for household expenses, while the petitioner husband would also pay for other expenses including transport, assessment and quit rent on the home, expenses which the respondent wife now has to pay for herself. I think taking into account the fact that the parties before me are a more than wealthy upper middle class family with considerable assets, I have to consider the means and needs of the parties in the light of the following:

(1) This is a family that has accumulated substantial matrimonial properties throughout their marriage. At present, there are four properties in joint names of both the petitioner husband and the respondent wife and three properties that are in the sole name of the petitioner husband, where all of those three properties are fully paid for and are unencumbered. During the marriage, the respondent wife was given a total sum of RM4,500 for the household expenses. At the time, the respondent wife did not have to pay for petrol or transport, assessment, quit rent and other outgoings, but these expenses now have to be borne by her. The petitioner husband drives a Proton Perdana 2.0L V6AT which he purchased in July 2001 where he pays a monthly instalment of RM2,168 (see petitioner's Ikatan Butir-Butir Penuh Harta-harta dan Pendapataan Pempetisyen at exh 'PA 23').

(2) The petitioner husband is a member of the Subang Golf Club, the Airforce Recreational Club, the Royal Selangor Club, Bukit Kiara Club and Leisure Holidays. The petitioner's monthly subscriptions alone to these clubs total RM345.98 every month. The petitioner husband had also made a payment of RM3,035.16 to the Bukit Kiara Club in May 2003 (see petitioner's Ikatan Butir-Butir Penuh Harta-harta dan Pendapataan Pempetisyen at exh 'PA 14').

(3) The petitioner husband has investments totalling RM158,000 in Public Mutual Berhad (see petitioner's Ikatan Butir-Butir Penuh Harta-harta dan Pendapatan Pempetisyen at exh 'PA 8').

(4) The petitioner husband is also financially able to purchase insurance policies wherein the total monthly premiums payable are RM540.80 (see petitioner's Ikatan Butir-Butir Penuh Harta-Harta dan Pendapatan Pempetisyen at exh 'PAA 25').

[11] Therefore, the sums claimed by the respondent wife as maintenance are commensurate with the family's lifestyle and the needs of the respondent wife as well as the three children who are now 15, 16 and 20 years old. The children are also at an age where they are about to enter university and tertiary education. It is observed that the respondent wife had set out that her expenses on the children's education, medical bills and expenses on some miscellaneous expenses for the period between 2001 and 2003 which totalled to a sum of RM69,000. This averages to some RM1,900 a month not including the respondent wife's and the children's expenses on food, utilities, petrol, toll, clothes, toiletries, stationery, books and pocket money. Even averaging RM5 a meal for each person at three meals a day, the total on food would be RM1,800 a month for four persons. Electricity, water and phone bills for an average family of four would be RM500 a month while petrol and toll would be RM300 a month. A further RM600 would go towards covering expenses of entertainment, books, stationery, clothing, toiletries, miscellaneous expenses. The sum total of the aforesaid estimated expenses amounts RM5,100 per month as follows:

Average education & medical	- RM1,900
Food for four persons	- RM1,800
Electricity, water & telephone bills	- RM 500
Petrol and Toll	- RM 300
Entertainment, Books, Stationery	
Clothing, toiletries, miscellaneous	- RM 600
Total	- RM5,100

[12] (See respondent's affidavit affirmed on 28 October 2003 at exh 'KP-D' pp 52–58.)

[13] Hence, the respondent wife's claim for RM2,000 as maintenance for herself and RM3,000 as maintenance for the children is reasonable and in accordance with the standard of living of the family. This amount is also within the means of the petitioner husband as during the marriage, the petitioner husband had provided the respondent wife with a total of RM4,500 plus paying for the outgoings on the home, petrol and transport.

[14] I am of the opinion that this court is entitled to draw an adverse inference with regards to the petitioner husband's income as a result of his failure to provide full and frank disclosure as provided for under s 114(g) of the Evidence Act 1950. In the case of *Leow Kooi Wah v Philip Ng Kok Seng & Anor* [1997] 3 MLJ 133, it was held in the Court of Appeal:

> Whatever disclosure is by affidavit of facts, by affidavit of documents or by evidence on oath, the obligation of the Husband is to be full, frank and clear in that disclosure. Any shortcomings of the husband from the requisite standard can and normally should be visited at least by the court drawing inferences against the husband on matters the subject of the shortcomings.

[15] Mahadev Shankar J (as he then was) at p 143 stated:

> I entirely agree with Ms Chew that these rules impose upon the parties a spontaneous duty to exercise the utmost good faith in making the fullest disclosure of all relevant

information. The cases she cited of *J v J* [1955] P214 and *Livesey v Jenkins* [1985] FLR 812 are very persuasive because rr 73, 74 and 77 of the English Matrimonial Causes Rules 1977 are very similar. I quote with approval what Sachs J said in *J v J*:

> '… where a husband is fully capable of and has had opportunity to explain those affairs, and where he seeks to minimize the wife's claim, that husband can hardly complain if, when he leaves gaps in the court's knowledge, the court does not draw inferences in his favour … .
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> The effect has been that owing to the husband's grossly defective affidavit of documents, his failure to put before the court documents, the reticence in his long examination-in-chief, and his complete omission to keep or produce (I know not which) books of account, there have been kept from the court vital facts which he ought to have made plain. His attitude, to my mind, has been throughout an attitude of 'catch me if you can'. In substance, he sought to give the impression of a man barely subsisting in a Nissen hut, and then to say 'disprove that and the consequent inferences if you can'.
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> For a husband in maintenance proceedings simply to wait and hope that certain questions may not be asked in cross-examination is wholly wrong.
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> In the light of his apparent misapprehension, it is as well to state expressly something which underlies the procedure by which husbands are required in such proceedings to disclose their means to the court. Whether that disclosure is by affidavit of facts, by affidavit of documents or by evidence on oath (not least when the evidence is led by those representing the husband) the obligation of the husband is to be full, frank and clear in that disclosure. Any shortcomings of the husband from the requisite standard can and normally should be visited at least by the court drawing inferences against the husband on matters the subject of the shortcomings in so far as such inferences can properly be drawn.'

[16] It is noted that despite the petitioner husband being served with a notice to produce and the notice to proceed with an application for ancillary relief, the petitioner husband has failed to provide full and frank disclosure as to his true income and assets. I think the onus is on the petitioner husband to show this court what his income is. It is also noted that prior to the petitioner husband's resignation on 30 November 1999 he was employed as a general ganager of Directional (M) Sdn Bhd drawing a salary of RM15,000 a month. The petitioner husband had also received a sum of RM155,916.49 as a form of gratuity upon his resignation in 1999 from his previous employers. The petitioner husband has failed to provide an account of what has become of this money save for general statements despite being put to proof by the respondent wife. The petitioner husband has been less than frank in his disclosure with regards to this said amount. The petitioner husband states that he is a director and shareholder of two companies namely, Prisma Dagang Sdn Bhd and Zee Solutions Com Sdn Bhd. The petitioner husband then makes bare averments that he does not receive any income. At para 7 of the petitioner's affidavit in reply affirmed on 28 April 2003, he states 'saya adalah Pengarah dalam kedua-dua syarikat tersebut tetapi saya tidak menerima sebarang pendapatan atau faedah daripada kedua-dua syarikat tersebut'. However, the petitioner husband's documents clearly show otherwise. The company, Prisma Dagang Sdn Bhd has a paid up share capital of RM510,000 while Zee Solutions Com Sdn Bhd has a paid up share capital

of RM602,666 (see petitioner's Ikatan Butir-Butir Penuh Harta-Harta dan Pendapatan Pempetisyen at exh 'PA 18' and 'PA 16'). PA 18 shows that there was a pay out of RM75,000 as director's fees in the year 2000. Obviously, the petitioner husband had received substantial income from this company. Despite the onus on him of providing full and frank disclosure of his income and assets, the petitioner husband has only provided the statement of account for the company Prisma Dagang Sdn Bhd for the year 2000 (see petitioner's Ikatan Butir-Butir Penuh Harta-Harta dan Pendapataan Pempetisyen at exh 'PA 18'). 'PA 16' with respect to Zee Solutions Com Sdn Bhd also shows that in the year ending 31 December 2000 there was an amount of RM103,683.04 due to the director and in the year ending 31 December 2001 there was an amount of RM287,105.79 due to the director. This amount was reduced to RM2,695.04 in the year ending 31 December 2002. Therefore, a director had received a sum of RM284,410.75 some time in 2002. The petitioner husband has not provided any explanation of this amount to this court and an adverse inference must be made that the petitioner husband had in fact received the amount of RM284,410.75 as he is not only a director but also the majority shareholder of Zee Solutions Com Sdn Bhd (see petitioner's Ikatan Butir-Butir Penuh Harta-Harta dan Pendapatan Pempetisyen at exh 'PA 16'). 'PA 17' again with respect to Zee Solutions Com Sdn Bhd shows that the company has money in its EON Bank Berhad account totalling RM66,052.65 in the year ending 31 December 2000 which amount was reduced to an overdrawn sum of RM7,413.59 in the year ending 31 December 2001 but which amount was then standing at RM39,014.12 in the year ending 31 December 2002. This company had paid out staff salaries of RM70,508 in 2000 and RM134,005 in 2001. The petitioner husband now expects this court to believe that he, as a director and majority shareholder, does not receive any income from this company (see petitioner's Ikatan Butir-Butir Penuh Harta-Harta dan Pendapatan Pempetisyen at exh 'PA 17'). 'PA 18' the accounts of Zee Solutions Com Sdn Bhd for year ended 30November 2000 shows that there was an amount of RM192,042 due to a director in the year ending 30 November 2000. Again, the petitioner husband has not provided any explanation of this money (see petitioner's Ikatan Butir-Butir Penuh Harta-Harta dan Pendapatan Pempetisyen at exh 'PA 18').

[17] Furthermore, the petitioner husband has failed to provide full and frank disclosure as follows:

(1) The petitioner husband has failed to provide details of his sources of income, only stating that he derives no income from the two companies he is a director and shareholder of. The above paragraphs clearly show that the petitioner husband has not provided full and frank disclosure;

(2) The petitioner husband has failed to provide an account of the rentals he received from rental of matrimonial properties that were purchased during the course of the marriage;

(3) The petitioner husband has failed to provide an accurate and complete amount of the proceeds of sale of matrimonial properties he has sold wherein he had retained the proceeds of sale for his sole benefit. The

petitioner husband has merely stated that all the moneys have been utilised for various expenses without providing any proof thereof;

(4) The petitioner husband has refused to provide a frank disclosure of his share trading accounts, only providing an account balance enquiry dated 17 June 2003 which shows no shares in the account although the account is stated to be active. The petitioner husband should have provided his Malaysian Central Depository Statements for the last few years to show transactions over a period of time (see Petitioner's Ikatan Butir-Butir Penuh Harta-Harta dan Pendapatan Pempetisyen at exh 'PA 7');

(5) The petitioner husband has only provided a balance sheet and profit and loss account for Zee Solutions Com Sdn Bhd for the year 2000 (see petitioner's Ikatan Butir-Butir Penuh Harta-Harta dan Pendapatan Pempetisyen at exh 'PA 17');

(6) The petitioner husband has only provided the statement of account for the company Prisma Dagang Sdn Bhd for the year 2000;

(7) The petitioner husband only provided a Form J for one year, did not provide his EA Forms, only one month's credit card statement, only one month's bank statement from one bank despite the *onus* of full and frank disclosure and a notice to produce being served.

[18] Therefore I think following the decision in the case of *Leow Kooi Wah v Phillip Ng Kok Seng* [1997] 3 MLJ 133, I ought to infer and the petitioner husband ought to be visited with an adverse inference that by reason of his failure to provide full disclosure, that had full disclosure been made it would show that he has the financial capacity to meet the respondent wife's and children's claims for maintenance.

[19] Pursuant to s 93 of the LRA, the petitioner husband has a primary duty in law to provide the children with accommodation, clothes, food and education as may be reasonable having regard to his means and station in life. It is observed that the respondent wife is currently unemployed and therefore does not have the means to contribute towards the maintenance of the children. Although the respondent wife had worked as a trained staff nurse until sometime in mid-1993, she was compelled to cease working full time in order to care for the children who were still very young and to manage the household. The decision that the respondent wife cease full time employment was a joint-decision made between the petitioner husband and the respondent wife. The respondent wife has not been working since mid-1993, a period of nearly 10 years. She is now 50 years old and is unable to secure employment. The petitioner husband on the other hand is a businessman who runs his own business. The case of *Ng Lean Huat v Lim Joo Khim* [1992] 3 CLJ 647 cited by the petitioner husband can also distinguished from our present situation. The wife in the above case was 33 years of age and therefore did have the potential of obtaining work in the near future. Further, the case of *Gisela Gertrud Abe v Tan Wee Kiat* [1986] 2 MLJ 297 (SC) cited by the petitioner husband can also be distinguished, as there was evidence in that case that the husband was retrenched by his employer and as such the learned judge had accordingly varied the maintenance to a reduced amount.

[20] Section 86 of the LRA provides for the recovery of arrears of maintenance for the respondent wife while s 98 of the LRA provides for the recovery of arrears of maintenance for the children. In the case of *Diana Clarice Chan Chiing Hwa v Tiong Chiong Hoo* [2002] 2 MLJ 97, the Court of Appeal had exercised such power when the court ordered that the husband pay all arrears due to the wife.

[21] EPF moneys is a matrimonial asset, as it is an asset acquired during the existence of a marriage and therefore is subject to division between the parties. In my article reported in the *Malayan Law Journal* [2003] 4 MLJ cxxix, on '*How Litigants Should Prepare Their Cases in Divorce Proceedings*', where I said:

> Matrimonial assets are not only landed property but also car, shares, savings, unit trusts, insurance policies, EPF balances, club memberships, … .

[22] The same position was taken by the Court of Appeal in the case of *Ching Seng Woah v Lim Shook Lin* [1997] 1 MLJ 109, where an order that a sum of RM86,875 be paid to the wife out of the husband's EPF when it is paid out in accordance with the law was upheld. Also in the case of *Lim Kuen Kuen v Hiew Kim Fook & Anor* [1994] 2 MLJ 693, Mohd Hishamudin JC (as he then was) quoting the decision of Chan Sek Keong J in *Ong Chin Ngoh v Lam Chin Kian* where at p 417 of the judgment said:

> CPF (Central Provident Fund) contributions are compulsory. They are part of the wages or salaries of workers and employees. They constitute a valuable source of funds upon their retirement, whether for themselves alone or for themselves and their families. They are matrimonial assets if acquired during the marriage. If the CPF contributions were not deducted from the wages or salary of a worker, they would have gone to providing for himself and the family.

[23] The fact of the matter is, the rationale behind EPF is that had the marriage subsisted and the parties had lived their golden years together, they would both have been able to retire and enjoy and benefit from the moneys set aside in EPF contributions. On the facts before me, the respondent wife had given full time employment as a result of a joint decision made between the parties so that she could attend to the welfare and needs of the children as well as care for the household and the petitioner. The respondent wife not only sacrificed her career and advancement therein but as a result of the decision, the respondent wife had been deprived for further EPF payments of her own. As a result of the respondent wife ceasing full time employment, the petitioner husband was allowed to concentrate and advance in his career for the benefit of the family. Now, with the breakdown of the marriage, the petitioner husband should not be allowed to solely benefit from the EPF while the respondent wife is the one who has had to incur the loss of her own career and EPF. The wife respondent's EPF contributions are minimal considering that she was employed overseas when earning the bulk of her income and had ceased working for a considerable length of years. If indeed the respondent's wife's EPF is in issue, I think both the husband and wife's EPF could be pooled and each party given half of the joint EPF sum.

[24] For these reasons, I hereby order:

(1) that the petitioner husband shall pay the respondent wife the sum of RM2,000 a month as maintenance for the respondent wife, which maintenance shall be payable in advance on or before the 7th day of each month;

(2) that the petitioner husband shall pay the respondent wife the sum of RM3,000 a month as maintenance for the said children of the marriage, which maintenance shall be payable in advance on or before the 7th day of each month until the said children complete full time education, notwithstanding that the said children shall have attained the age of 18 years;

(3) that the petitioner husband shall pay the respondent wife arrears of maintenance for respondent wife and children from May 2001;

(4) that increase of the said maintenance at the end of every 12 months is dismissed;

(5) that the petitioner husband shall pay for all the educational expenses for the said children of the marriage up to and including tertiary and/or university education, notwithstanding that the said children shall have attained the age of 18 years;

(6) that the respondent wife shall be entitled to one half share of the moneys standing in the petitioner's provident fund;

(7) that the petitioner husband do bear the costs herein;

(8) as to division of matrimonial assets, the division is in accordance with the terms of settlement by consent as in encl 29.

Respondent wife's cross-petition allowed with costs.

Reported by Sugandra Rao